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NO. 57445-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

HAJRUIN KUSTURA, GORDANA LUKIC, AND
MAIDA MEMISVIC,

Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

AMICUS CURIAE BRIEF
WASHINGTON SELF INSURER ASSOCIATION

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I. INTRODUCTION

The consolidated appeals in these three cases address several issues, however the amicus, The Washington Self Insurer Association (hereinafter referred to as "WSIA") only presents argument on the issue pertaining to the alleged responsibility of the Department of Labor and Industries (hereinafter referred to as "the Department) and the Board of Industrial Appeals (hereinafter referred to as "the Board") to provide interpreters for workers' compensation claimants who have limited English proficiency (hereinafter referred to as LEP") for communications with their attorneys. Without repeating the arguments and authorities advocated by the Department and the Board on the other issues in these appeals, to the extent that the issues and arguments might affect self insured employers, the WSIA adopts and joins in those arguments.

The Appellants hope that this court will extend the existing requirements of prepaid interpretation into the native languages for LEP persons to any and all communications with attorneys representing a worker in a workers' compensation claim. The existing requirements for these services to be provided by the Department, the Board, and the self insured employers are already sufficient, if not beyond legal requirements. Tellingly, the Appellants cannot present one compelling principle of law, either in statute, regulation, or case law that requires

the extension of interpreter services to communications between the worker and his/her attorney.

Rather than repeat all of the arguments well presented by the Department and the Board regarding the impropriety of this appeal because no Department or Board order addressed the interpreter service issue, the WSIA will focus on how the current interpreter requirements for self insured employers fully comply with federal and state law and must not be further expanded. For the reasons stated by the Department, the Board, and the WSIA herein, the Superior Court's order denying such benefits should be affirmed.

II. IDENTITY AND INTEREST OF AMICUS

The WSIA was established in June 1972 when the then-new Washington State law authorized self-insurance for workers' compensation. The association has grown from the original 52 members to 385 and is the only statewide, non-partisan, nonprofit organization dedicated to represent the interests of self insured employers (sometimes referred herein as "SIE").[1] The purpose and mission of the WSIA is to provide industry leadership and support to employers through legislation, education and technical services to ensure that its members give the highest quality services to their employees when seeking workers' compensation benefits. *Id.* The WSIA has a legal committee and an amicus subcommittee who

[1] See the WSIA website found at www.wsiassn.org.

selects appropriate cases and appeals to advocate the unique and specific positions of the membership of the WSIA.

III. STATEMENT OF THE CASE

The Appellants are injured LEP workers seeking worker compensation benefits. Mr. Kustura appealed to the Board various Department orders pertaining to his claim, including the wage rate order. He also sought other wage loss compensation for his dependent daughter, the cost of replacement of health insurance, larger contribution from the employer, and benefits under the Collective Bargaining Agreement. At some point during the appeal to the Board, Mr. Kustura requested an interpreter for proceedings during the Board appeal and for communications with his attorney. He never sought interpreter services at the Department level. Although the Board provided an interpreter during the time that he testified, the Board denied his requests for other such services. His appeal to the Superior Court was unsuccessful and the Superior Court affirmed the Board's decision.

As to Gordana Lukic, the Department issued an order determining her wage rate and her time loss rate. Ms. Lukic did not seek an appeal of the order, nor did she request interpreter services at any time when the Department was handling her claim. Later, Ms. Lukic did appeal certain Department orders, including the termination of her time-loss payments and closure of the claim

without provision of a permanent partial disability payment. Some of those appeals were untimely. During the Board appeals, Ms. Lukic sought interpreter services and she was provides those services for her testimony and the testimony of witnesses. She was not provided interpreter services for communications with her attorney. Evidence also demonstrated that the Department provided her interpreter services for her treatment sessions with her doctors and during the independent medical examinations ("IME"). On her appeal to a three-member Board, some orders were reversed and others were affirmed, including the order declaring the adequacy of interpreter services. The subsequent appeal to the Superior Court resulted in affirmation of the Board's decisions.

The record for Maida Memisevic indicated that she disputed whether certain health care benefits should be included in calculating her time-loss benefits pursuant to the Washington Supreme Court's decision in *Cockle v. Dep't of Labor & Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001). She alone requested that the Department provide her with interpreter services for her attorney-client communications during the claims adjudication. Like Ms. Lukic, her appeal to the Department was untimely, because, according to her, the notice was in English and did not contain "black faced type." The Department confirmed that Ms. Memisevic received interpreter services for medical treatment appointments, communications with the Department and visits with a vocational counselor.

However, the Department refused to provide interpreter services for attorney-client (worker) communications. The Board affirmed the Department's decision and the Superior Court further affirmed the Board's decision.

This consolidated appeal followed.

At the heart of the Appellants' arguments is their belief that the Department and the Board, and indirectly, the self insured employers as well, should provide paid interpreter services for their communications with their attorneys, employers, all health care providers, and any other communications necessary for the adjudication of their workers' compensation claim. Such an extension of this specialized assistance is far beyond what is required by Washington State law, its Constitution or the U.S. Constitution.

IV. ARGUMENT.

A. Standard of Review.

An agency's decisions and actions are questions of law to be reviewed de novo, including those which invoke violations of due process rights. *See e.g. Mansour v. King County*, 131 Wn. App. 255, 263, 128 P.3d 1241 (2006). When due process grounds for reversal of the agency's actions or decision are presented, the reviewing court must make two determinations: 1) whether the aggrieved party had adequate notice and opportunity to be heard; and 2) whether the alleged "procedural irregularities" did not undermine the fundamental fairness of the

administrative proceeding. *See Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

B. The Appellants had Adequate Notice and Opportunity to be heard at both the Department and the Board levels.

The Washington Legislature enacted RCW 2.43.010 - 080 to ensure that LEP citizens will be fully protected during legal proceedings, interpreters were required. Legal proceedings were defined in RCW 2.43.020(3) as "a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof." The Legislature, in RCW 2.43.040 divided up the responsibility for the cost of interpreters: to the governmental body "**initiating the legal proceedings**" when the LEP citizen is subpoenaed, summoned or otherwise compelled to attend, or is determined to be indigent (.040(2) emphasis added), and to the LEP citizen in all other legal situations. .040(3).

1. Statutory interpretation does not support the Appellants' contention that they are entitled to expanded interpreter services.

Statutory interpretation rules require the courts to give effect to the legislative intent. *Enterprise Leasing,* 139 Wn.2d at 552, 988 P.2d 961 (citing *State v. Sweet,* 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999)). The courts first

look to the plain language of the statute to determine its meaning and then review the contested statutory language within the context of the entire statute. *In re Sehome Park Care Center, Inc.,* 127 Wn.2d 774, 778, 903 P.2d 443 (1995). The courts try to avoid "[s]trained, unlikely or unrealistic" interpretations. *Bour v. Johnson,* 122 Wn.2d 829, 835, 864 P.2d 380 (1993). If there is no ambiguity or no statutory definition, then the court give the words in a statute their common and ordinary meaning, consulting the dictionary where necessary to discover the common meaning. *Garrison v. Nursing Bd.,* 87 Wn.2d 195, 196, 550 P.2d 7 (1976).

Here, two terms are at issue: and "legal proceedings" and "initiating." The term "legal proceedings," clearly and specifically defined by RCW 2.43. 020(3), "means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof." The term "initiating" is not defined by the statute but is in Webster's New World Dictionary, "to introduce by first doing or using; start."

Using these definitions, both as the statutory definition and as the common meaning, the results are that the proceedings before the Department and the Board are legal proceedings, but the worker is the one who initiates the compensation claim. To the extent that claims adjudication is similar when carried out by a SIE,

the same analysis applies. Therefore, if the Department is not required to provide interpreter services, likewise the self insured employer should not legally bear the responsibility for the expense of translation or interpretation.

Without authority, the Appellants and their proponents want to stretch the legislative and common meaning of both the terms "legal proceeding" and "initiate" beyond logic. The Appellants and others argue that the Department actually initiates the proceeding because it adjudicates the claim, and if the worker is not satisfied with the Department's determination, further litigation goes forward, and it is the Board that initiates the appeal. *See e.g.* Amicus Brief of WSTLA, p.11. Similarly, the Appellants contend that the self-insured employer initiates the proceeding because it is required to notify the Department when there is an industrial accident giving rise to a worker injury. *See e.g.* RCW 51.28.010(1); WAC 296-15-200. These arguments are nonsensical, and if true, then one can argue that every civil defendant who files an answer to a complaint with defenses or counterclaims "initiates" the legal proceedings. The reality is simple: The claimant initiates the legal proceedings and for those times specified by statute or regulation, a LEP claimant is entitled to a prepaid interpreter. If not specifically required by statute or regulation, the LEP must provide his or her own interpreter and translator.

2. Due process considerations does not Department-level interpreter services.

WSIA adopts, without repeating, the Department's analysis of the law of procedural and substantive due process which applies to this argument. See Brief of Respondent, pp. 35 – 42. The Department provided for interpreter services in full compliance with the principles of due process. Those occasions where such services were provided included appointments for medical and vocational treatments, IMEs, and communications with the Department. These are the same occasions where the self insured employers would also provide interpreter services. The only difference is that the interpretation would include communications with the employer, not the Department. The WSIA conducted its own research as did the Department, and no published civil case was found in any Washington appellate court that required the interpreter services sought by the Appellants.

3. Self insured Employers Provide More than Adequate Interpreter and Translation Services to its LEP Workers.

The self insured employers find themselves in similar straits as does the Department on this issue. Self-insurance is a unique program in which the employer provides any and all appropriate benefits to the injured worker. *See e.g.* RCW 51.08.173. The decision to manage its workers claims is considered by self

insured employers to be a privilege, a huge responsibility, and a serious commitment to their workers. In order to qualify as self insured employers, business entities must comply with the statutory requirements established in RCW 51.14.010 - .140. Simply described, self-insurance is a long-term obligation by the employer to be responsible for the payment of benefits during the time that a claim is open. The employer remains liable for benefits during a lengthy reopening period provided in industrial insurance law. This remains the employer's responsibility whether the self-insurance certification is continued or surrendered. The Department oversees the provision of benefits to ensure compliance with its rules and regulations and reviews the financial strength of the self-insurer to ensure that workers' compensation obligations can be met. *See* WAC 296-15-001 to -265.

In large part, the regulations for the actual handling of worker compensation claims are much the same at those regulations in force for claims handled by the Department but much more is expected of SIE. In addition to requirements for proof of sufficient funds to pay appropriate claims (*see* WAC 296-15-121 to -181), self insured employers must also produce various reports to the Department on the claims that the self insured employers are handling. *See e.g.* WAC 296-15-200 to 221. If, however, the Department is forced to provide

more services of any kind, including interpreter services, the self insured employers will also be required to provide those services.

WAC 296-15-350 specifically tells the self-insured employer what it must do to ensure appropriate handling of claims. In situations where a worker is LEP and is making a claim for compensation arising from a work related injury, subsection (9) provides as follows: "[e]very self-insurer must ensure a means of communicating with all injured workers." While this regulation appears to be clear on its face, and the self-insured employers understand and apply it, the Department has given additional guidance.

The most recent Departmental interpretation of WAC 296-15-350(9) dated August 13, 2007 applies to both self insured employers and the Department. It states that for LEP workers, communication in English is appropriate with the claimant's attorney, if s/he has an attorney. If not, an interpreter is necessary for communications with the claimant. Translation of documents into the native language of the claimant is appropriate **if** the worker needs such assistance as well as interpretation during communications with the Department, SIE, at medical, vocational and independent medical examination appointments. *See* Appendix A for a complete copy of this Management Update.[2] The WSIA contends that this

[2] Amicus Northwest Justice Project cites to a December 2006 memorandum from the Department. See p. 7-8; fn.15. That memorandum is out of date and the August 2007 Management Update is the most current statement from the Department and pertains both to itself and to SIE.

interpretation is beyond that stated in WAC 296-15-350(9) and hopes that these appeals with give some direction to the Department and to WSIA members.

C. The "perceived irregularities" did not undermine the fundamental fairness of the proceedings in which the Appellants participated.

In order to show that the Appellants' due process rights were violated by their perceived lack of sufficient interpreter and translation services, they must demonstrate actual prejudice. *See Motley-Motely, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (holding that to constitute a due process violation, the plaintiff must be prejudiced); *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997) (same). *See also Gutierrez-Chaves, INS*, 298 F.3d 824, 830 (9th Cir. 2002) (holding that in order to prove a due process violation, the claimant must show that a better translation would have resulted in a better outcome.). None of the Appellants have demonstrated prejudice, actual or otherwise. These three Appellants had all of their issues adequately presented to both the Department and the Board. In fact, Ms. Lukic prevailed in part and there is no showing at all that the orders in which she did not prevail were because she did not have an interpreter. None of the Appellants or their supporter can point to one instance where the lack or inadequacy of interpretation cost them benefits or reduced benefits.

It is undisputable that English is the national language of the United States. *See e.g. Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2nd Cir. 1983); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975); *Commonwealth v. Olivo*, 337 N.E.2d 904, 911 (Mass. 1975). Not even the IRS is required to have tax forms in every language spoken by any tax payer in this country. Workers in this country and in the State of Washington must know some English to complete employment forms and to process workers' compensation forms. These workers are minimally obligated to request translation and interpreter services for those occasions where it is important to fully understand what is being said. However, for communications with advocates of their choosing, they should be responsible for obtaining those services.

V. CONCLUSION.

The problem of fully participating in a country where the vast majority speaks a different language arises in far more situations than when LEP claimants seek workers' compensation benefits. Although Washington State has a policy of providing interpreter and translations services as provided in RCW 2.43 *et seq.*, these Appellants cannot expect that they will receive prepaid interpreter and translation services for each and every communication from the beginning of the claim process to the last word of a decision on appeal. Such a result is beyond the expectations of due process rights and beyond the realistic expectations of self

insured employers, such as members of the WSIA. The current law and regulations more than adequately provide for prepaid translation and interpreter services and should not be extended. For these reasons and the reasons presented by the Department and Board, the WSIA seeks affirmation of the Superior Court in the Kustura, Lukic and Memisevic decisions.

Respectfully submitted this 18 day of October 2007.

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ATTACHMENT A

Management Update

Insurance Services: Claims Administration and Self-Insurance

Effective Date
08/13/2007
REVISED 08/17/07

Topic
Interpreter and Translation Services To Workers

Issuing Authority
Sandy Dziedzic
Cheri Ward
Jean Vanek

Interpreter and Translation Services to Workers

The department or self-insured employer (SIE) (including the SIE third party administrator) will provide an interpreter to communicate with an unrepresented worker who has limited English-speaking proficiency or similarly limiting sensory impairment.

NOTE: Where a worker with limited English proficiency is represented by an attorney, the department or SIE may communicate through the attorney in English. It is the responsibility of the attorney representative to communicate with his or her client worker. If the represented worker with limited English proficiency contacts the department or SIE by phone or in person without counsel, an interpreter is authorized for the oral communications. The department or SIE is not required to provide interpreters for communications in relation to any proceedings at the BIIA or Court.

When the worker requests interpreter services, the department or SIE may verify whether the worker needs assistance in translation. Workers can report limited English proficiency status on the Report of Accident, SIF2 form, or by notifying the department or SIE by phone or letter.

Limited English proficiency is defined as limited ability or inability to speak, read, or write English well enough to understand and communicate effectively. This includes most people whose primary language is not English. Services should also be provided to workers similarly impacted by hearing, sight, or speech limitations.

Interpreters are authorized when a limited English proficiency worker needs to communicate with the department or SIE, attend medical and vocational appointments, and at independent medical examinations (IME). Authorized interpreters must be provided by the department or SIE for IMEs.

Interpreter services also include written translation of necessary correspondence to and from the unrepresented limited English proficiency worker. Copies of both the original and translated versions of the document should be maintained in the claim file.

	Resources **AT&T Language Line Instructions** http://ohr.inside.lni.wa.gov/webhome/resource_docs/InterpreterService.htm **Online Reference System (OLRS)** http://olrs.apps-inside.lni.wa.gov/ Claims Training Bulletin: Translation Process Management Memo: Spanish Translations Training Handout: Services for the Hearing & Speech Impaired WAC 296-20-2025 Contact Claims Training if you have any questions. *NOTE: This is an interim policy change. This issue has been referred to the policy committee to be included in upcoming revisions.*